STATE OF MICHIGAN

COURT OF APPEALS

In re ERIC G. AND MURIEL E. VON MYHR TRUST.

GARY VON MYHR and JAMES VON MYHR,

Petitioners-Appellants,

v

THOMAS F. GUNNING, PAULETTE GUNNING, and CALHOUN AREA HUMANE SOCIETY,

Respondents-Appellees.

UNPUBLISHED
November 18, 2003

No. 241926
Calhoun Probate Court
LC No. 2001-000078-TT

Before: O'Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Petitioners Gary Von Myhr and James Von Myhr appeal as of right from the probate court's order denying their motion to set aside a trust amendment. We affirm.

In this case, petitioners are the grandchildren of the deceased trustors, Eric Von Myhr and Muriel Von Myhr. Petitioners brought an action to set aside an amendment of their grandparents' trust after the amendment removed petitioners and their three children as beneficiaries of the trust.

Petitioners first issue is that the trustors were not competent to execute the amendment and that respondents had failed to rebut the presumption that they had exerted undue influence on the trustors to amend the trust. We disagree.

Findings of fact made by a probate court sitting without a jury will not be reversed unless they are clearly erroneous. *In re Estes Estate,* 207 Mich App 194, 208; 523 NW2d 863 (1994). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Christiansen v Gerrish Twp,* 239 Mich App 380, 387; 608 NW2d 83 (2000).

The test for mental capacity to amend a trust used by the probate court is "whether the person in question possesses sufficient mind to reasonably understand the nature and effect of the act in which the person is engaged." *In re Erickson Estate*, 202 Mich App 329, 332; 508 NW2d 181 (1993). And if a person was unable to understand, in a reasonable manner, the nature and consequences of his or her act, he or she lacks capacity to contract. *Star Realty, Inc v Bower*, 107 Mich App 248, 250; 169 NW2d 194 (1969).

Petitioners argue that the probate court erred by finding that the trustors were competent under the above definition because it failed to place more emphasis on the testimony of Dr. James Gandy, a geriatric psychiatrist who evaluated the trustors in March 2000. Dr. Gandy first determined then that Muriel Von Myhr was physically dependent on others for daily living activities and "not well oriented to time or place." Dr. Gandy stated that Muriel Von Myhr scored low on a mental status exam, which classified her as having moderate dementia. Dr. Gandy also testified that Eric Von Myhr lacked the ability to give consistent directives regarding medical and financial matters because he had "deficits in his cognition" and tended to have scattered, tangential thought processes.

In ruling that the trustors were competent to amend their trust, the probate court acknowledged the reliability of the testimony from Dr. Gandy and acknowledged that it was likely that both parties suffered from some form of moderate dementia. But the probate court also acknowledged and summarized testimony from witnesses who observed the trustors to be fully competent to amend their trust. For instance, Patrick Hirzel, the trustors' former attorney, observed the trustors as competent to amend the trust because they were coherent and consistent over the course of three separate meetings Hirzel had with the them regarding the amendment of their trust.[1] At each of these meetings, the trustors were adamant about wanting to change their trust to eliminate petitioners as beneficiaries.

We will only second-guess the probate court's finding of mental competency if it is clear that a mistake has been made. *Christiansen, supra* at 387. And where there is evidence pro and

---

[1] We note that petitioners contend that the trial court's finding that Hirzel was a "disinterested witness" was clearly erroneous. However, petitioners cite no applicable authority for this contention. "A party may not leave it to this Court to search for authority to sustain or reject its position." *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). The appellants may not merely announce a position and leave it to this Court to discover and rationalize the basis for their claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003), nor may they give issues cursory treatment with little or no citation of supporting authority, *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), after remand 211 Mich App 214; 535 NW2d 568 (1995). Argument must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7), *Thomas v McGinnis*, 239 Mich App 636, 649; 609 NW2d 222 (2000); *Haefele v Meijer, Inc*, 165 Mich App 485, 494; 418 NW2d 900 (1987), remanded 431 Mich 853; 425 NW2d 691 (1988). Appellants' failure to properly address the merits of their assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Therefore, the issue is abandoned. *Yee*, *supra* at 406; *Magee*, *supra* at 161.

con regarding mental competency, much weight should ordinarily be given to the conclusion reached by the probate judge, who has had the opportunity of seeing and hearing the witnesses. *In re Erickson, supra* at 333. In this case, we find that based on the competing testimony regarding the trustors' mental capacity, it cannot be said that the probate court made a clear mistake requiring reversal.

Petitioners next claim that the probate court erred in finding that the presumption of undue influence had been overcome. We disagree. To establish undue influence it must be shown that a person was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition and destroy the free thinking of that person. *In re Erickson, supra* at 331, quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). A mere opportunity to exert undue influence is not enough. *Id.* The party alleging undue influence must come forward with affirmative evidence that undue influence was exercised. *Id.*

We find that petitioners failed to present any "affirmative evidence" that respondents actually exercised undue influence over the trustors. Petitioners' only purported "affirmative evidence" of undue influence is the fact that, while other people close to the trustors were refusing the couple's gifts, respondents had not refused to be named beneficiaries of the amended trust. We are not persuaded that because respondents did not refuse to be named beneficiaries of a trust, it equals circumstantial evidence of undue influence.

Having reviewed the record, we cannot say that we are convinced that a mistake has been made. *Christiansen, supra* at 387. The probate court's findings that there was no undue influence and that the trustors were mentally competent to amend their trust was not clearly erroneous.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder